Office Supreme
FIL
SEP 2
CHARLES

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

Nos. 37-39

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

BRIEF FOR PETITIONERS.

On Writs of Certiorari to the United States Circuit Court of Appeals For the Ninth Circuit.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
No. 1 Montgomery Street, San Francisco, California,
Attorneys for Petitioners.

Subject Index

Page

Opinions Below 2

Jurisdiction 2

Statement of the Case..... 3

Specification of Errors 9

Summary of Argument 10

Question Presented 12

Argument 13

Introductory 13

(1) The consolidated return was filed in strict compliance with the 1918 Revenue Act in force at the time of filing. The good faith and honesty of the taxpayers have not been questioned..... 16

(2) The Revenue Act of 1918 in effect at the time of the filing of the consolidated return allowed as a deduction the sum of $2000; this exemption was eliminated by the 1921 Act where the net income exceeded $25,000; the 1921 Act was retroactive to January 1, 1921, as a result of which one-third of the exemption of $2000 claimed by these taxpayers was eliminated. No other changes in the 1921 Act necessitated any changes in the consolidated return of these taxpayers filed before the adoption of that act..... 18

(3) Assuming the Commissioner had the right to require the filing of a new or amended return after the adoption of the 1921 Act, Treasury Decisions 3305 and 3310, calling for such new or amended return, clearly do not apply to the taxpayers herein..... 20

(4) Respondent's position is that no return at all was filed under the 1921 Act, but every act of the Commissioner after the receipt of the consolidated return proves it was accepted as a return under that act... 22

(5) The 1921 Act provides a statutory period of four years after the filing of a return, within which an additional assessment might be made or a sixty-day letter issued; this time was extended by waivers to

Page

December 31, 1925; the issuance of sixty-day letters on May 11, 1928, was too late 26

(6) The Commissioner of Internal Revenue, respondent herein, has confessed error (or failed to prosecute) in several cases involving the exact point involved here, after decisions by the Board of Tax Appeals against taxpayers, and after appeals by these taxpayers to the courts 28

(7) Discussion of opinion of the Circuit Court of Appeals for the Ninth Circuit rendered herein (69 Fed. (2d) 582) 32

(8) Discussion of cases relied upon by the respondent 36

Conclusion 44

Table of Authorities Cited

Cases

Pages

Adams, Cushing & Foster, Inc. v. Commissioner, 19 B. T. A. 89 ..... 29, 31, 40

Bowers v. N. Y. and A. Lighterage Co., 273 U. S. 346, 71 L. Ed. 678 45

Clifton Manufacturing Co. v. U. S., 3 Fed. Supp. 508..... ..... 37, 39, 42, 43, 44

Clifton Manufacutring Co. v. U. S., 70 Fed. (2d) 102...37, 42, 43

Commissioner v. Stetson & Ellison Co., 43 Fed. (2d) 553.. 34

Conrad Hardware Co., 8 B. T. A. 512..... 21

G. Corrado Coal & Coke Interests, Inc. v. Commissioner, 19 B. T. A. 691..... 30, 31

Globe Excelsior Oak Tanning Co. v. U. S., 2 Fed. Supp. 470 ..... 37, 38, 39, 43

Gus Holstine Dry Goods Company v. Commissioner, 16 B. T. A. 1124 ..... 28, 31

Isaac Goldmann Company v. Burnet, 51 Fed. (2d) 427.... ..... 13, 14, 22, 31, 38, 39, 40, 43

Lancaster Lens Co., 10 B. T. A. 1153..... 33

Myles Salt Co. v. Commissioner, 49 Fed. (2d) 232..... ..... 13, 14, 16, 30, 31, 35, 38, 39, 40, 41, 42, 43

National Paper Products Company v. Helvering, 69 Fed. (2d) 857 19

Ralston Purina Co. v. U. S., 58 Fed. (2d) 1065..... 37, 39

United States v. Updike, 1 Fed. (2d) 550..... 36

United States v. Updike, 25 Fed. (2d) 746..... 36

United States v. Updike, 281 U. S. 489, 74 L. Ed. 984....37, 45

Updike v. U. S., 8 Fed. (2d) 913..... 36, 39

Updike v. U. S., 32 Fed. (2d) 1..... 37

Updike v. U. S., 271 U. S. 661, 70 L. Ed. 1138..... 36

Valentine-Clark Co. v. Commissioner, 52 Fed. (2d) 346... ..... 13, 14, 16, 26, 30, 31, 38, 39, 40, 41, 43

Whitney Bodden Shipping Co. v. U. S., 52 Fed. (2d) 1003..37, 38

Statutes

	Pages
Revenue Act of 1916 (39 Stat. 756)	38
Revenue Act of 1917 (40 Stat. 300)	38
Revenue Act of 1918 (40 Stat. 1057)	38
Section 236 (c)	6
Section 240 (a)	7
Section 236 (c)	6, 30
Section 263	7
Section 250 (d)	9
Section 236	18
Revenue Act of 1921 (42 Stat. 227)	38
Section 236 (b)	7
Section 263	7, 18, 23
Section 230	8
Section 250 (d)	8, 9, 26
Section 236	11, 18
Section 240 (b)	18
Section 250 (b)	22
Section 1307	24
Section 205 (a)	35
Section 227 (a)	36
26 Stat. 828	3
36 Stat. 1157	3
43 Stat. 928	3
Treasury Decision 3305	7, 11, 20
Treasury Decision 3310	7, 11, 20, 22
U. S. C. A., Title 28, Section 347	3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1934

Nos. 37-39

ZELLERBACH PAPER COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

ZELLERBACH PAPER COMPANY, as Transferee of A. S. Hopkins Company (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

NATIONAL PAPER PRODUCTS COMPANY (a corporation), *Petitioner,*

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

BRIEF FOR PETITIONERS.

On Writs of Certiorari to the United States Circuit Court of Appeals For the Ninth Circuit.

OPINIONS BELOW.

This proceeding comes before this Court on writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review judgments of that Court in the three cases above noted.

The several judgments are to be found in No. 37, R. 142; No. 38, R. 94; No. 39, R. 94.

A joint opinion, affirming the decisions of the United States Board of Tax Appeals was rendered by the Circuit Court of Appeals and reported in 69 Fed. (2d) 852. It is printed in No. 37, R. 125.

A joint opinion was rendered by the Board of Tax Appeals and is found in 26 B. T. A. 96. It is printed in No. 37, R. 81. A dissenting opinion was also filed (No. 37, R. 90).

The Board of Tax Appeals' decisions in favor of the Commissioner of Internal Revenue, Respondent herein, and against the taxpayers, Petitioners herein, in the three cases, are to be found in No. 37, R. 94; No. 38, R. 61; No. 39, R. 63.

JURISDICTION.

The judgments of the Circuit Court of Appeals in the several cases were entered on February 28, 1934 (No. 37, R. 142; No. 38, R. 94; No. 39, R. 94).

A single petition for a writ of certiorari in each case was filed May 10, 1934, and the writs were granted on June 4, 1934 (No. 37, R. 146; No. 38, R. 97; No. 39, R. 97).

Jurisdiction of this Court rests on subdivisions (a) and (c) of Section 240, amended, of the Judicial Code (U. S. C. A. title 28, Sec. 347; Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

STATEMENT OF THE CASE.

This is a joint brief in support of the Petitioners in the three cases involved.

On July 16, 1921, Zellerbach Paper Company, a corporation, on behalf of itself and its corporate subsidiaries, National Paper Products Company and Sanitary Products Corporation, filed a Consolidated Income and Profits Tax Return *for the fiscal year ended April 30, 1921,* with the Collector of Internal Revenue at San Francisco, California (No. 37, R. 86). This original return is before this Court for its inspection.

Previously thereto, to-wit, on March 15, 1921, the Zellerbach Paper Company, *as successor of the A. S. Hopkins Company,* had filed an Income and Profits Tax Return on behalf of the Hopkins Company *for the calendar year 1920* with the Collector at San Francisco (No. 37, R. 85, 86). This original return is also before the Court for its inspection.

The income of the A. S. Hopkins Company *after December 31, 1920,* was included in the consolidated return of the Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, and filed on July 16, 1921, as above noted.

This was because the Hopkins Company kept no separate books of account after December 31, 1920, its operations being mingled with Zellerbach Paper Company as if it were a branch of the latter company (No. 37, R. 87). There was no segregation of income or expense of the Hopkins Company after December 31, 1920, and it was testified such segregation would probably have been impossible (No. 37, R. 111).

All of the outstanding stock of the A. S. Hopkins Company (a corporation) was purchased by Zellerbach Paper Company in October of 1920, and the Hopkins Company thereupon became an affiliate of the purchasing corporation. As a result thereof, the Commissioner of Internal Revenue thereafter asserted that the income of the A. S. Hopkins Company for the months of November and December, 1920, should have been included in the consolidated return of the Zellerbach Paper Company and its two additional subsidiaries above named, which return was filed July 16, 1921.

The deficiency claimed by the Commissioner of Internal Revenue against Zellerbach Paper Company *as successor of A. S. Hopkins Company* (this is case numbered 38) is based upon the income of the A. S. Hopkins Company for the months of November and December, 1920, which income was ascribed by the Commissioner to the consolidation, although it had been separately reported by the Zellerbach Paper Company in the return filed March 15, 1921, and a tax paid thereon.

From a practical standpoint the action of the Commissioner of Internal Revenue consisted in eliminat-

ing the income of the Hopkins Company for the months of November and December, 1920, from the return filed on behalf of the Hopkins Company on March 15, 1921, and adding it to the consolidated income of the Zellerbach Paper Company and its affiliates for the fiscal year ended April 30, 1921. In transferring this income of the Hopkins Company to the consolidation the Commissioner recognized it had already been reported and a tax paid thereon. In his sixty-day letter to the Zellerbach Paper Company, dated May 11, 1928, the Commissioner explained the transfer of this income to the consolidation, and added: "Adjustment will be made to A. S. Hopkins Company" (No. 37, R. 26).

No mention is made in the Opinion of the Circuit Court of Appeals of the facts in relation to the separate return filed on behalf of the A. S. Hopkins Company for the calendar year 1920. We state the facts primarily to correct a misstatement in the first paragraph of the Opinion of the Circuit Court of Appeals, i. e., that a consolidated return was filed by the Zellerbach Paper Company and its affiliated corporations, the National Paper Products Company and *A. S. Hopkins Company* for the year ended April 30, 1921, on July 16, 1921. Actually, this consolidated return was filed on behalf of Zellerbach Paper Company and its affiliates, National Paper Products Company and *Sanitary Products Corporation,* the latter company, however, having operated at a loss for the period.

The question we are concerned with is whether the statutory period for the making of an additiona

assessment began July 16, 1921, the date of the filing of the consolidated income and profits tax return on behalf of the affiliated group as above noted.

On the 27th day of February, 1925, Zellerbach Paper Company and National Paper Products Company each executed an "Income and Profits Tax Waiver" consenting to an extension of time within which the Commissioner might make additional assessments for the year ending April 30, 1921, to December 31, 1925 (No. 37, R. 82, 84). No other waivers by any of the companies involved were ever executed.

After the filing of the returns above referred to the Commissioner used said returns as a basis for auditing the books of the taxpayers, and on May 11, 1928 (nearly seven years after the filing of the consolidated return on July 16, 1921), issued deficiency notices as follows: To Zellerbach Paper Company (No. 37, R. 82); to Zellerbach Paper Company, as transferee of the A. S. Hopkins Company (No. 37, R. 87); and to National Paper Products Company (No. 37, R. 84). The amounts of these deficiencies were later changed slightly by stipulation of the parties, the petitioners herein reserving, however, the defense of the statute of limitations to the claims of the Commissioner. These stipulations appear at No. 37, R. 82-87.

The filing of the Consolidated Income and Profits Tax Return by the Zellerbach Paper Company on behalf of itself and its subsidiaries on July 16, 1921, occurred while the Revenue Act of 1918 (40 Stat. 1057) was in force. Under the provisions of this act (Sec. 236(c)) a specific exemption of $2000 was allowed a domestic corporation, which was deducted

from the net income of the taxpayer to determine the amount subject to tax. In the case of affiliated corporations filing a consolidated return, but one exemption of $2,000 was allowed (Section 240(a)).

On November 23, 1921, the Revenue Act of 1921 (42 Stat. 227) was adopted. Under the provisions of this act, if the net income of the corporation (or affiliated corporations) was in excess of $25,000 the $2000 was not allowable as an exemption (Section 236(b)). This provision of the new law, together with other income tax provisions, was retroactive to January 1, 1921 (Sec. 263).

The fiscal year of the affiliated group began May 1, 1920, and ended April 30, 1921; thus eight months of the fiscal year fell in the calendar year 1920, and four months in the calendar year 1921. Thus the exemption of $2,000 was reduced by one-third thereof and the taxes due from the taxpayers increased in a merely nominal amount.

After the adoption of the Revenue Act of 1921, and on March 16, 1922, the Commissioner caused to be issued Treasury Decision 3305 (printed in Appendix A, p. 56), which was amended by Treasury Decision 3310 (printed in Appendix A, p. 57), issued on March 28, 1922.

Briefly, these Treasury Decisions provided that if prior to November 23, 1921, a taxpayer had filed a return and paid a tax for a fiscal year ending in 1921, computed under the Revenue Act of 1918, *and it was subject to an additional tax for the same period,* under the Revenue Act of 1921, the return *cov-*

ering such additional tax should be filed at a certain time as therein set forth.

There were additional changes in the Revenue Act of 1921 leading to additional taxes in the cases of some taxpayers, none of which changes affected the taxpayers herein, or the returns filed. See Opinion of the Circuit Court of Appeals (No. 37, R. 126, 127).

The additional taxes due from the petitioners herein were ascertainable, of course, by the Commissioner himself and through a simple mathematical computation. Instead of the consolidated group being entitled to a $2000 exemption, it was entitled to but $1333.33, the balance thereof, to-wit, $666.67, being subject to tax at the rate of 10%, the tax amounting to $66.67, all as provided in the 1921 Act (Sec. 230).

No additional returns were filed by any of the petitioners herein after the adoption of the 1921 Act (No. 37, R. 82, 83, 86).

The Commissioner's sixty-day deficiency notices were not mailed until May 11, 1928, nearly seven years after the filing of the consolidated return on July 16, 1921.

The 1921 Revenue Act (Sec. 250(d)) provided for a four year statutory period (from the filing of a return), after which the Commissioner was barred; the 1918 Revenue Act (Sec. 250(d)) provided for a five year period.

The Commissioner asserted at the time of the issuance of the sixty-day letters on May 11, 1928, that the taxpayers had failed to file a return *under the*

1921 Revenue Act and that "no statute of limitations applies" (No. 37, R. 26; No. 38, R. 23; No. 39, R. 23).

SPECIFICATION OF ERRORS.

As set forth in our brief in support of our petition for writs of certiorari, we respectfully submit that the Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

A. In finding and holding that the collection of the deficiencies in question was not barred by the Statute of Limitations. Revenue Act of 1918, 40 Stat. 1057, Sec. 250(d) thereof; Revenue Act of 1921, 42 Stat. 227, Sec. 250(d) thereof;

B. In finding and holding that the Income and Profits Tax Return for the fiscal year ended April 30, 1921, filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, and in strict conformity with the Revenue Act of 1918, did not set the Statute of Limitations in motion;

C. In finding and holding that the Consolidated Income and Profits Tax Return filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on the 16th day of July, 1921, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921, which Act was retroactive as to the pertinent portions thereof as of January 1, 1921;

D. In finding and holding that the Revenue Act of 1921 required the filing of a new Income and

Profits Tax Return, which would differ from the return theretofore filed under the Revenue Act of 1918, only by the elimination of a portion of the $2000 exemption;

E. In affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company v. Helvering, No. 37 herein, which Order found that a deficiency was due from the said Zellerbach Paper Company in the sum of $69,114.02 (No. 37, R. 94);

F. In affirming the Order of the United States Board of Tax Appeals in Zellerbach Paper Company as Transferee of A. S. Hopkins Company v. Helvering (No. 38 herein), which Order found that a deficiency was due from the said Zellerbach Paper Company, as transferee of A. S. Hopkins Company, in the sum of $1,744.37 (No. 38, R. 61).

G. In affirming the Order of the United States Board of Tax Appeals in National Paper Products Company v. Helvering, No. 39 herein, which Order found that a deficiency was due from the said National Paper Products Company in the sum of $32,990.18 (No. 39, R. 63).

SUMMARY OF ARGUMENT.

Introductory.

The Circuit Court of Appeals for the Fifth and Eighth Circuits, and the Court of Appeals of the District of Columbia have decided the exact question involved herein in favor of the Petitioners. There are no cases (other than Board of Tax Appeals cases)

exactly in point which have been decided against the Petitioners.

(1) The Consolidated Income and Profits Tax Return filed on July 16, 1921, while the 1918 Act was in force, was prepared and filed in strict compliance with that Act. The good faith and honesty of the taxpayers in preparing and filing this consolidated return have not been, and cannot be, questioned.

(2) The Revenue Act of 1918 (40 Stat. 1057), in effect at the time of the filing of the consolidated return on July 16, 1921, allowed as a deduction in arriving at net income the sum of $2000. The Revenue Act of 1921 (42 Stat. 227) was adopted on November 23, 1921, and was retroactive to January 1, 1921. This Act provided (Sec. 236) that if the net income of the taxpayers exceeded $25,000 the $2000 deduction was not allowable. The income of the consolidated group in the instant cases exceeded $25,000. One-third of the fiscal year ended April 30, 1921, was embraced within the 1921 Act. One-third of the exemption, therefore, was not allowable in arriving at net income.

(3) Assuming the Commissioner of Internal Revenue had the right to require the filing of a new or amended return after the adoption of the 1921 Act, the Treasury Decisions (Nos. 3305 and 3310) requiring such new or amended return clearly do not apply to the taxpayers herein.

(4) Respondent's position is that no return at all was filed under the 1921 Act, but every act of the Commissioner after the filing of the consolidated re-

turn proves that it was accepted as a return under that Act.

(5) The statutory period within which additional assessments might be made (or deficiency notices mailed) was four years under the 1921 Act. This period was extended in the instant cases by waivers executed by Zellerbach Paper Company and National Paper Products Company (which waivers were obtained prior to the running of the four year period), to December 31, 1925. The time within which additional assessments might be made (or deficiency notices mailed) expired on that date, and obviously the issuance of the notices on May 11, 1928, was too late.

(6) The Commissioner of Internal Revenue, Respondent herein, has confessed error in several cases involving the exact point involved herein, after decisions by the Board of Tax Appeals against taxpayers, and after appeals by these taxpayers to the Courts.

(7) Discussion of Opinion of Circuit Court of Appeals for the Ninth Circuit rendered herein (69 Fed. (2d) 852).

(8) Discussion of cases relied upon by the Respondent.

QUESTION PRESENTED.

The sole question is limitation, i. e., whether the Commissioner of Internal Revenue was barred from asserting or collecting the deficiencies claimed on May 11, 1928, the date of the issuance of his sixty-day deficiency letters. The Respondent's answer before

the Board of Tax Appeals admits this in the following language (No. 37, R. 76):

> "Admits * * * that the only issue before the Board for decision is whether deficiency is barred by the statute of of limitations."

See also No. 38, R. 42, and No. 39, R. 45.

That this is the sole question is also shown by the majority opinion of the Board of Tax Appeals, although a minor contention of the Commissioner is referred to and decided adversely to him (No. 37, R. 89). That the sole question is limitation is also shown by the dissenting opinion of the Board (No. 37, R. 90).

The Circuit Court of Appeals for the Ninth Circuit states the question as follows (No. 37, R. 127).

> "The sole question presented is whether or not the deficiency notice of May 11, 1928, was too late."

ARGUMENT.

Introductory.

The exact question involved herein has been decided in favor of the Petitioners in three cases, to-wit, *Myles Salt Company v. Commissioner,* 49 Fed. (2d) 232, decided by the Circuit Court of Appeals for the 5th Circuit, on April 21, 1931;

Isaac Goldmann Company v. Burnet, 51 Fed. (2d) 427, decided by the Court of Appeals of the District of Columbia, on June 29, 1931;

Valentine-Clark Company v. Commissioner, 52 Fed. (2d) 346, decided by the Circuit Court of Appeals for the 8th Circuit, on July 31, 1931.

There is a very minor variation between the facts in the *Isaac Goldmann Company* case, supra, and the instant cases, to-wit:

In the instant cases, the taxpayers did not file a new or amended return after the adoption of the 1921 Act on November 23, 1921; in the *Isaac Goldmann Company* case, an amended return *was* so filed for the purpose of correcting the item of invested capital (see 51 Fed. (2d) at 427).

That these three cases are exactly in point is recognized by the majority opinion of the Board of Tax Appeals in the instant cases in the following language (No. 37, R. 89):

> "The Board has consistently held in situations like the one here present that the return filed pursuant to the Revenue Act of 1918 is not sufficient to start the period of limitation."

Cases theretofore decided by the Board of Tax Appeals are cited, including the *Myles Salt Company*, the *Valentine-Clark Company* and the *Isaac Goldmann Company* cases, and the reversal of the Board in these three cases by the Courts is noted.

The dissenting opinion of the Board is in agreement. It reads as follows (No. 37, R. 90):

> "Van Fossan, dissenting: I am unable to agree with the prevailing opinion in these cases. The conclusions of the Board have been tested by appeal to the courts on three occasions and in each case the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Goldmann Co., 17 B. T. A. 1103;

reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. I believe the position taken by the Board in these and like cases has been erroneous and that in the instant case the petitioners should prevail.

"Marquette agrees with this dissent."

It is also recognized by the Circuit Court of Appeals that the three cases referred to are exactly in point. This is shown in the opinion of the Ninth Circuit Court in two companion cases now before this Court (October Term, 1934, Nos. 35, 36), and involving a fiscal year ending in 1925. The Circuit Court of Appeals' opinion is reported in 69 Fed. (2d) 857. The Court, after referring to and discussing the *Myles Salt Company, Valentine-Clark Company* and *Isaac Goldmann Company* cases, says, at page 863:

"In the companion case (C. C. A.) 69 F. (2d) 852 we have held that a return filed under the Revenue Act of 1918 could not be considered a return under the Revenue Act of 1921, if it did not show the deductions as authorized by the Act of 1921, although in the particular case involved the statutory deduction of $2,000 was the only change made in the return of the particular taxpayer. We have declined with all due respect to follow decisions to the contrary by co-ordinate courts. These decisions are pressed upon us here as a ground for reversing the action of the Board of Tax Appeals. It is not disputed by the Commissioner that the principle of those decisions is applicable to the case in hand. * * *

* * * * * * *

"We wish to make it clear that unless we are correct in holding that the decisions of our co-

ordinate courts are erroneous this case as well as the companion case should be reversed."

There are no Court decisions against the taxpayers, and involving the 1918 and the 1921 Revenue Acts.

The opinions in the *Myles Salt,* the *Valentine-Clark* and the *Isaac Goldmann* cases are printed in full in Appendix B.

The question is clear cut. Either the Circuit Courts of Appeals for the 5th and 8th Circuits and the Court of Appeals of the District of Columbia are correct, or the Board of Tax Appeals and Circuit Court of Appeals for the 9th Circuit are correct in reaching the opposite conclusion. The two groups of decisions cannot be reconciled and this Court must decide between them.

---

(1) THE CONSOLIDATED RETURN WAS FILED IN STRICT COMPLIANCE WITH THE 1918 REVENUE ACT IN FORCE AT THE TIME OF FILING. THE GOOD FAITH AND HONESTY OF THE TAXPAYERS HAVE NOT BEEN QUESTIONED.

No question has ever been raised as to the good faith or honesty of the taxpayers in preparing their consolidated return for the fiscal year ended April 30, 1921, which was filed with the Collector of Internal Revenue in San Francisco, July 16, 1921.

We believe that an inspection of this return will show it was intended to and did convey all necessary information to the Commissioner which would enable him to determine whether the correct amount of tax had been reported. The best evidence of this fact is

that the return was used as the basis of the Commissioner's audit.

The return is on United States Internal Revenue Service Form 1120; it is supported by complete detailed schedules totalling over fifty pages, stated in consolidated form and separately, where necessary, for the parent company and its subsidiaries, including the following:

Balance sheets;

Analyses of surplus accounts and reconciliations thereof;

Details of gross income and deductions;

Schedules of depreciation;

Lists of dividends received;

Details of Liberty Bond exempt interest;

Schedules showing adjustments of book balance sheets for income tax purposes;

Copies of journal entries affecting the foregoing adjustments;

Schedules showing the computation of invested capital;

Schedule of inadmissible assets;

Inventory certificates.

With such a complete and detailed return before him it is little wonder that the Commissioner found it sufficient to undertake an audit thereof.

The original return, together with all schedules attached thereto, is before this Court for its inspection.

(2) THE REVENUE ACT OF 1918 IN EFFECT AT THE TIME OF THE FILING OF THE CONSOLIDATED RETURN ALLOWED AS A DEDUCTION THE SUM OF $2000; THIS EXEMPTION WAS ELIMINATED BY THE 1921 ACT WHERE THE NET INCOME EXCEEDED $25,000; THE 1921 ACT WAS RETROACTIVE TO JANUARY 1, 1921, AS A RESULT OF WHICH ONE-THIRD OF THE EXEMPTION OF $2000 CLAIMED BY THESE TAXPAYERS WAS ELIMINATED. NO OTHER CHANGES IN THE 1921 ACT NECESSITATED ANY CHANGES IN THE CONSOLIDATED RETURN OF THESE TAXPAYERS FILED BEFORE THE ADOPTION OF THAT ACT.

Section 236 of the 1918 Revenue Act provided in effect that for the purpose of determining the amount of net income subject to tax there should be allowed a credit, in the case of a domestic corporation, of $2000. The taxpayers herein claimed this exemption in their consolidated return filed July 16, 1921.

The Revenue Act of 1921 was adopted on November 23, 1921. Section 236 of this Act provided in effect that a credit of $2000 should not be allowed for the purpose of arriving at net income subject to tax where the net income exceeded $25,000.

Section 240(b) of the 1921 Act provided that where a consolidated return was filed there should be allowed in computing the income tax, only one specific credit (i. e., the sum of $2000) as provided in Section 236(b).

The net income of the affiliated group was admittedly in excess of the sum of $25,000.

Section 263 of the 1921 Act provided that Title II of said Act (called "Income Tax") should become effective as of January 1, 1921.

The fiscal year of the taxpayers ended April 30, 1921, as a result of which four months, i. e., January

to April, 1921, both inclusive, fell within the provisions of the newly adopted Act.

It is not denied that the effect of the above provisions of the 1921 Act was to eliminate one-third of the $2000 exemption claimed by the taxpayers in their consolidated return, resulting in the increase of taxable income by $666.67, and increasing the tax in the nominal sum of $66.67.

Other than the elimination of a part of the $2000 credit, there were no changes in the 1921 Act affecting the consolidated return filed by these taxpayers. In support of this, see the opinion of the Circuit Court of Appeals, 69 Fed. (2d) 852 at 853. See also the opinion of the Circuit Court in the companion case (involving a fiscal year ending in 1925), i. e., *National Paper Products Company v. Helvering,* 69 Fed. (2d) 857 at 863, reading as follows:

> "In the companion case (C. C. A.) 69 F. (2d) 852, we have held a return filed under the Revenue Act of 1918 could not be considered a return under the Revenue Act of 1921 if it did not show the deductions as authorized by the Act of 1921, *although in the particular case involved the statutory deduction of $2,000 was the only change made in the return of the particular taxpayer*" (Italics supplied).

(3) ASSUMING THE COMMISSIONER HAD THE RIGHT TO REQUIRE THE FILING OF A NEW OR AMENDED RETURN AFTER THE ADOPTION OF THE 1921 ACT, TREASURY DECISIONS 3305 AND 3310, CALLING FOR SUCH NEW OR AMENDED RETURN, CLEARLY DO NOT APPLY TO THE TAXPAYERS HEREIN.

We respectfully call the attention of the Court to Treasury Decision 3305, issued by the Commissioner of Internal Revenue on March 16, 1922, and printed in Appendix A at page 10.

This Treasury Decision reads in part as follows:

> "If any taxpayer has before November 23, 1921, filed a return for a fiscal year *ending in 1921,* and paid or become liable for a tax computed under the Revenue Act of 1918, *and is subject to additional tax for the same period* under the Revenue Act of 1921, *the return covering such additional tax* shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922", etc. (Italics supplied).

Treasury Decision 3310, printed in Appendix A at page 11, issued by the Commissioner on March 28, 1922, and amending Treasury Decision 3305, contains similar language. We submit it is perfectly obvious that the above quotation from Treasury Decison 3305 shows that the Commissioner had in mind the case of a taxpayer where changes in the 1921 Act necessitated a new return without which the Commissioner would be unable to audit the returns and properly determine and compute the amount of tax due.

Note that the Commissioner refers specifically to a fiscal year ending in 1921, such as, for instance, the

fiscal year of these taxpayers, which ended April 30, 1921, and that he calls for a new return only if such taxpayer is subject to additional tax *"for the same period under the Revenue Act of 1921."* Note that such return is to be filed for the purpose only of *"covering such additional tax."*

The fact is that taxpayers in the instant cases were not subject to any additional tax "for the same period" as theretofore covered in the return filed, i. e., the twelve months period ending April 30, 1921. On the contrary, the only period affected in so far as these taxpayers were concerned, was the four months period beginning January 1, 1921, and ending April 30, 1921.

We submit that the Commissioner himself did not desire a new return, and did not call for a new return from taxpayers situated as these taxpayers were and demonstrated conclusively he did not need a new or any additional return as he acted on the only return ever filed. In fact, the Commissioner could easily have determined the additional tax due by a simple mathematical computation.

In fact, the Board of Tax Appeals has held that he should have done so, for, in the case of *Conrad Hardware Co.,* 8 B. T. A. 512, the Board decided that a return, complete in all details except for the actual computation of the tax, was a valid return, the filing of which started the running of the Statute of Limitations against the Government. And, what is more important, the Commissioner of Internal Revenue acquiesced in that decision. (See VII—1 Cumulative Bulletin 7.)

The 1921 Act (Sec. 250(b) thereof) provided for the examination of the return by the Commissioner "as soon as practicable after the return is filed" for the express purpose of determining whether or not the correct amount was reported and computed therein. The point was considered by the Court in *Isaac Goldmann v. Burnet,* supra, the opinion in relation thereto reading as follows:

> "The Commissioner himself realized the confusion and waste inevitable if the returns already made were wholly disregarded and new ones required, and, in Treasury Decision 3310, demanded new returns from taxpayers who had, under the 1918 act, made returns for the fiscal year ending during 1921 only in those cases in which the taxpayer was subject to specific additional taxes under the 1921 act. *The purpose of this ruling, obviously, we think, was to provide a new return only in those cases where, under the provisions of the latter act, a liability for other or additional taxes was created through a change in the basis of computation, necessitating other information or new figures to allow the Commissioner to determine the tax liability under the Act.* (Italics supplied.)

---

(4) RESPONDENT'S POSITION IS THAT NO RETURN AT ALL WAS FILED UNDER THE 1921 ACT, BUT EVERY ACT OF THE COMMISSIONER AFTER THE RECEIPT OF THE CONSOLIDATED RETURN PROVES THAT IT WAS ACCEPTED AS A RETURN UNDER THAT ACT.

We have already dealt with the completeness of the consolidated return filed July 16, 1921. We have

pointed out no question has been raised as to the honesty or good faith of the taxpayers in preparing and filing this return.

Upon the adoption of the new Revenue Act on November 23, 1921, there were three classes of returns subject to the Commissioner's consideration. First, returns theretofore filed by taxpayers with fiscal years ending in 1921, which were not affected by the new act; secondly, returns which complied with the new law except for the elimination of a part of the $2000 credit; and finally, returns which needed to be amended by reason of substantial changes in the law affecting this group of taxpayers.

The consolidated return herein fell within the second classification.

This return was not rejected by the Commissioner; on the contrary, it was accepted by him as the return of the taxpayers named therein, for the fiscal year ended April 30, 1921.

Section 200 of the new law defined the term "taxable year" and stated: "The *first taxable year* to be called the taxable year 1921, shall be the calendar year 1921 *or any fiscal year ending during the calendar year 1921.*" (Italics supplied.) The return here was filed July 16, 1921, six and a half months *after* the 1921 Act became operative under the retroactive provisions of Section 263 of the new law.

Upon the adoption of the 1921 Revenue Act this return clearly became a return under the new law and certainly was accepted by the Commissioner as such. Nor did the Commissioner demand a new or

amended return as he was entitled to do under the provisions of Section 1307 of the 1921 Act.

And at the time of filing the return the Commissioner accepted the first installment of tax due thereunder, and thereafter accepted the additional installments until the full amount reported was paid.

On February 27, 1925, realizing that almost four years had elapsed since the filing of the return, and also apparently realizing that unless an extension of time to make additional assessments was obtained prior to July 16, 1925, he would be barred, the Commissioner requested and obtained from the Zellerbach Paper Company and National Paper Products Company, waivers extending his time to December 31, 1925.

The Commissioner certainly could not have been of the opinion on February 27, 1925, that no return had been filed under the 1921 Revenue Act, otherwise he would not have asked for these waivers.

Finally, the Commissioner must have recognized the anomalous position he was in, when on May 11, 1928, he issued sixty-day letters to the several taxpayers. The Schedules attached to this sixty-day letter are headed:

> "Statement of Returns Examined and Resulting Tax Liability (No. 37, R. 24).

Almost immediately following, the Commissioner says:

"Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds no statute of limitations applies" (No. 37, R. 26).

And under the heading "Schedule 1", the Commissioner states:

> "Net income *as disclosed by return,* $532,238.29" (No. 37, R. 27).

To what *return* is the Commissioner here referring?

There was only *one* consolidated return filed, covering the fiscal year ended April 30, 1921; the parties so stipulated (No. 37, R. 86).

In dealing with the question of depreciation, the Commissioner says: "Restored on *Return*" and "Deducted on *Return,*" setting forth the figures (No. 37, R. 31).

And finally, in connection with this phase of the matter, the Commissioner shows the original assessment of taxes against Zellerbach Paper Company and National Paper Products Company *was in accordance with the amounts reported in the consolidated return filed July 16, 1921.* For example:

"National Paper Products Company		
Total tax liability allocated Schedule 12		$56,070.44
Previously assessed: Account #400,016, July, 1921.		
Consolidated return	$83,118.56	
Less: Allocated to Zellerbach Paper Company *on basis of income reported*	58,189.64	24,928.92
Additional tax		$31,141.52"

(In quoting from the Commissioner's letter, italics have been supplied.)

(No. 37, R. 48, and see a similar recital at p. 49).

As was said by the Court in *Valentine-Clark Company v. Commissioner,* supra:

> "The position that the return was a nullity is evidently an after thought, arising when the question of the Statute of Limitations was raised."

---

(5) THE 1921 ACT PROVIDES A STATUTORY PERIOD OF FOUR YEARS AFTER THE FILING OF A RETURN, WITHIN WHICH AN ADDITIONAL ASSESSMENT MIGHT BE MADE OR A SIXTY-DAY LETTER ISSUED; THIS TIME WAS EXTENDED BY WAIVERS TO DECEMBER 31, 1925; THE ISSUANCE OF SIXTY-DAY LETTERS ON MAY 11, 1928, WAS TOO LATE.

Section 250(d) of the 1921 Revenue Act provides that the amount of income tax due under any return made under the Act shall be determined and assessed by the Commissioner within four years after the return was filed.

In view of the acceptance by the Commissioner of the consolidated return filed by the taxpayers herein on July 16, 1921, the Commissioner's "assessment" of the tax reported therein (No. 37, R. 48, 49); and his use of the return as the basis of his audit, we cannot see how it can be successfully contended that "no return was filed."

It is our contention the time within which additional taxes might have been assessed, or a sixty-day letter issued, would ordinarily have expired July 16, 1925, four years after the return was filed.

The Commissioner was apparently of this belief also.

On February 27, 1925 (before the expiration of the four year period), the Commissioner requested and obtained from the Zellerbach Paper Company a waiver reading as follows:

> "In pursuance of the provisions of existing Internal Revenue Laws Zellerbach Paper Company, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes *due under any return made* by or on behalf of said taxpayer for the fiscal year ended April 30, 1921, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals, then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board."
>
> (No. 37, R. 79, 80) (Italics supplied).

The above waiver was duly executed by officers of the corporation. A similar waiver was procured from National Paper Products Company.

The time to make additional assessments or to issue a sixty-day letter was thereupon extended *beyond* the four year period and to December 31, 1925. No additional waivers were obtained. The Commissioner

(for what reason has never been divulged) withheld the issuance of his sixty-day letters for two years four months eleven days *after* the expiration of the period within which such letters might properly have been issued.

We contend that on May 11, 1928, nearly seven years after the return was filed, the Commissioner was barred.

---

(6) THE COMMISSIONER OF INTERNAL REVENUE, RESPONDENT HEREIN, HAS CONFESSED ERROR (OR FAILED TO PROSECUTE) IN SEVERAL CASES INVOLVING THE EXACT POINT INVOLVED HERE, AFTER DECISIONS BY THE BOARD OF TAX APPEALS AGAINST TAXPAYERS, AND AFTER APPEALS BY THESE TAXPAYERS TO THE COURTS.

We will now show that the Commissioner of Internal Revenue in three cases involving exactly the same type of facts and exactly the same point of law, after decisions in favor of the Commissioner by the Board of Tax Appeals, and the filing of Petitions for Review of these decisions by the taxpayers, confessed error in two cases, and moved to dismiss in the third case.

> *Gus Holstine Dry Goods Company, Petitioner, v. Commissioner, Respondent,* 16 B. T. A. 1124.

It appears from the decision of the Board of Tax Appeals in this case that the taxpayer filed its return for the fiscal year ended February 28, 1921, on or before June 15, 1921. No further return was filed respecting that year. The Commissioner's deficiency letter was issued December 30, 1928.

In the return filed the taxpayer took as a deduction the $2000 credit allowed under the 1918 Revenue Act. The taxpayer conceded that this credit was reduced by $366.67 under the provisions of the 1921 Act, and that this resulted in a small additional tax.

The Board held that a return was necessary under the 1921 Act and, no such return having been filed, the statute of limitations had not run.

The taxpayer filed a Petition for Review with the Court of Appeals of the District of Columbia. The case is docket No. 5354 in that Court.

The Commissioner, through his attorneys, filed with the above entitled Court on *September 8, 1931,* his "Confession of Error", and on *September 10, 1931,* the Court reversed the decision of the Board of Tax Appeals. (See Vol. 342 C. C. H., p. 2069, second column. This is a recognized Federal tax service published by Commerce Clearing House, Inc.)

Adams, Cushing & Foster, Inc., Petitioner, v. Commissioner, Respondent, 19 B. T. A. 89.

This case is also on all fours with the instant case.

The taxpayer filed its return for the fiscal year ended January 31, 1921, on April 14, 1921.

The taxpayer claimed a credit of $2000 in its return, to which it was entitled under the 1918 Act, but under the 1921 Act it was entitled to a credit of but eleven-twelfths of that amount or $1833.34. No additional return was filed after the adoption of the 1921 Act covering the fiscal year in question.

The deficiency notice was issued on March 18, 1926, more than four years after the filing of the return.

The Board of Tax Appeals relied upon its decision in *Myles Salt Company, Ltd.*, 18 B. T. A. 742 (which decision was thereafter reversed), and held the statute of limitations had not run.

The taxpayer filed with the Circuit Court of Appeals for the First Circuit a Petition for Review of the Board's decision. The case is numbered 2566 in the Circuit Court.

On *September 10, 1931,* the Commissioner, through his attorneys, filed with the Circuit Court his Confession of Error and the Board's decision was thereupon reversed. (See Vol. 342 C. C. H., p. 2069.)

G. Corrado Coal & Coke Interests, Inc., Petitioner, v. Commissioner, Respondent, 19 B. T. A. 691.

In this case it appears the taxpayer filed its return for the fiscal year ended May 31, 1921, on August 15, 1921. In its return the Petitioner claimed a credit of $2000 in accordance with Section 236(c) of the Revenue Act of 1918. Under the Revenue Act of 1921 the taxpayer was entitled to but seven-twelfths of this credit. No other return for the fiscal year in question was filed.

The deficiency letter was mailed to the taxpayer on March 5, 1927, long after the statutory period as provided in the 1921 Act had expired.

The Board relied upon its decision in *Valentine-Clark Company,* 14 B. T. A. 562 (which decision was thereafter reversed), and decided in favor of the Commissioner.

The taxpayer filed with the Circuit Court of Appeals for the Third Circuit, a Petition to Review the

decision of the Board. The case is numbered 4545 in the Circuit Court. On motion of the Commissioner himself, made on May 26, 1931, the case was dismissed for lack of proper prosecution by the Petitioner, i. e. the Commissioner. (See Vol. 342 C. C. H., p. 2069.)

It is interesting to note certain dates in relation to the above matters. The *Myles Salt Company* case, supra, was decided by the Fifth Circuit in favor of the taxpayer *on April 21, 1931.*

In the *G. Corrado Coal & Coke Interests* case, supra, the Commissioner moved to dismiss on *May 26, 1931.*

The Court of Appeals of the District of Columbia then decided the *Isaac Goldmann Company* case, supra, in favor of the taxpayer on *June 29, 1931,* and this was followed by a similar decision in favor of the taxpayer by the 8th Circuit in the *Valentine-Clark Company* case on *July 31, 1931.*

Following these decisions, the Commissioner confessed error in the *Gus Holstine Dry Goods Company* case, supra, and in the *Adams, Cushing & Foster Company* case, both on *September 10, 1931.*

The opinions of the Board of Tax Appeals in the instant cases were promulgated on May 17, 1932.

(7) DISCUSSION OF OPINION OF CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED HEREIN (69 FED. (2d) 852).

The opinion of the Ninth Circuit Court of Appeals herein shows *inter alia:*

1. That the consolidated return was a comprehensive document, containing lists and schedules of various kinds, and totaling over fifty pages (No. 37, R. 125).

2. That the Commissioner's audit of this return was also comprehensive, covering twenty-nine pages of the printed transcript (No. 37, R. 126).

3. That no changes in the consolidated return were made necessary by the Revenue Act of 1921 other than the change in the $2000 exemption (No. 37, R. 126) (and see opinion in the companion cases, 69 Fed. (2d) 863).

4. That the sole question is whether or not the deficiency notices of May 11, 1928, were too late (No. 37, R. 127).

5. That the question submitted to the Court has been decided against the contention of the Commissioner by two Circuit Courts of Appeals, and by the Court of Appeals of the District of Columbia (No. 37, R. 127).

There is a statement in the opinion, however, which should be corrected. The opinion reads:

> "The petitioners in the case at bar do not contend that their return shows either the 'deductions' allowed by the Revenue Act of 1921 or the 'net income' as fixed by that Act, but they do claim that the return they made July 16, 1921, did show the gross revenue, the deductions therefrom and the net revenue under the Revenue Act

> of 1918 in force at the time the return was made, and that their failure to show the net income in accordance with the subsequently enacted Revenue Act of 1921 was not their fault because it was impossible to know what the Revenue Act of 1921 would require" (No. 37, R. 128, 129).

On the contrary, the petitioners *do* contend that the return filed showed not only the "deductions" allowed by the 1921 Act, but also the "net income" as fixed by that Act, with such a minor variation that it is of no consequence.

The "deductions" claimed were exactly those deductions allowable under both the 1918 and 1921 Revenue Acts with the single exception of one-third of the $2000 credit claimed in the return.

And the "net income" reported was in accordance with the requirements of the 1921 Act except for the nominal increase of $666.67, resulting from the elimination of one-third of the $2000 credit.

Of course the Commissioner in his audit of the return increased very materially the net income, and hence the tax due, but these increases were *not* the result of changes in the 1921 Act. As was said in the opinion in the companion cases: "In the particular case involved, the statutory deduction of $2000 was the only change made in the return of the particular taxpayer."

Many cases have held that mistakes and omissions do not invalidate the return. For instance, see *Lancaster Lens Co.*, 10 B. T. A. 1153.

> "Regarding the year 1918 the respondent contends that the return filed on April 25, 1919, was

> not the return required by statute in that it did not include all items of income and deductions; that the amended return filed in 1925 was the return so required; and that in any event the voluntary filing of the amended return amounted in effect to the waiving of the Statute of Limitations. * * * *In our opinion it is immaterial that the return filed on April 25, 1919, did not include all the income or deductions. There is no intimation that the return was fraudulently filed or that it did not disclose what the petitioner's officers believed was the correct tax liability at the time.*"

See also *Commissioner v. Stetson & Ellison Co.* (C. C. A. 3), 43 Fed. (2d) 553, wherein the Court stated:

> "The Commissioner further says that the consolidated returns were not returns for the respondent because they did not fully comply with the statute. ***In other words, he charges that they were defective,*** in that the income, invested capital, and deductions were not separated. But the return did include, as the Board found, the gross income, deductions, and credits in totals for the consolidated group, including the gross income, deductions, and credits of the respondent."

We think the gist of the Circuit Court opinion is to be found at page 856 of the reported case (or see No. 37, R. 139) reading as follows:

> "If Congress expressly provided for a return by the taxpayer for its fiscal year 1920-1921 as it clearly did, we do not see how the taxpayer can insist that a return filed by it before the Revenue Act of 1921 was enacted and which did not comply with the Revenue Act of 1921, started

the running of the limitation under the Revenue Act of 1921 for making the assessment under that act, nor do we see how the phraseology of the decision of the Commissioner which expressly required the filing of a return can be held to excuse the filing of a return on the theory that he adopted a return theretofore filed when that return is impliedly repudiated by the decision which expressly requires a new return in lieu thereof as a sufficient basis for an assessment of the tax under the Revenue Act of 1921."

A complete reply to this statement and to the opinion of the Circuit Court of Appeals herein is to be found in the case of *Myles Salt Company v. Commissioner,* supra:

> *"If it had been filed or refiled the day after the Act of 1921 was passed, it would have been clearly good; the error in the deductible credit being easily remediable by the Commissioner without further information from the taxpayer.* But it is said that because it was filed before the Act was passed it cannot be a return under the Act. The Act itself, however, is retroactive, declaring itself to be effective as of January 1, 1921. If in effect on that date for other purposes, why should it not speak from that date as to filing returns? Difficulty can arise only concerning returns for fiscal years ending during 1921. Congress had them in mind, for in Section 205 (a) it was provided: 'If a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be' arrived at on a basis stated. Entirely conscious, therefore, that such returns had already been filed before the Act was passed on November 23rd, the only provision Congress made as to filing them

was Section 227 (a): 'Returns * * * shall be made on or before the 15th day of the third month following the close of the fiscal year.' If this requirement is read as of January 1st the return in question was filed in literal compliance with it. That it was the intent of Congress thus to ratify and adopt returns filed between January 1st and the passing of the Act also appears from its repeal of the former Act as of January 1st, so that there was no law except the Act of 1921 that could apply to such returns" (Italics supplied).

---

(8) DISCUSSION OF CASES RELIED UPON BY THE RESPONDENT.

The cases relied upon by the Respondent in the Court below are as follows:

(1) *United States v. Updike,* 1 Fed. (2d) 550, decided on August 15, 1924, by the Nebraska District Court, Omaha Division.

(2) *Updike v. U. S.,* 8 Fed. (2d) 913, decided on December 1, 1925, by the Circuit Court of Appeals for the 8th Circuit; this was an affirmance of *U. S. v. Updike,* 1 Fed. (2d) 550, supra.

(3) After the Circuit Court of Appeals decision hereinabove mentioned, a petition was filed by the taxpayer for a writ of certiorari. This was denied on April 19, 1926. See *Updike v. U. S.,* 271 U. S. 661, 70 L. Ed. 1138.

(4) *United States v. Updike,* 25 Fed. (2d) 746, decided on April 13, 1928, by the Nebraska District Court, Omaha Division.

(5) *Updike v. U. S.,* 32 Fed. (2d) 1, decided on May 29, 1929, by the Circuit Court of Appeals for the 8th Circuit; this was an affirmance of *U. S. v. Updike,* 25 Fed. (2d) 746, supra.

(6) *U. S. v. Updike,* 281 U. S. 489; 74 L. Ed. 984, decided by the Supreme Court May 19, 1930, and being an affirmance of the decision reported in 32 Fed. (2d) 1, see supra. The Supreme Court, however, did not pass upon the question involved herein.

(7) *Whitney Bodden Shipping Co. v. U. S.,* 52 Fed. (2d) 1003, decided on October 20, 1931, by the Court of Claims.

(8) *Ralston Purina Co. v. U. S.,* 58 Fed. (2d) 1065, decided June 6, 1932, by the Court of Claims.

(9) *Globe Excelsior Oak Tanning Co. v. U. S.,* 2 Fed. Supp. 470, decided February 6, 1933, by the Court of Claims.

(10) *Clifton Manufacturing Co. v. U. S.,* 3 Fed. Supp. 508, decided on January 31, 1933, by the District Court, W. D. South Carolina.

(11) *Clifton Manufacturing Co. v. U. S.,* 70 Fed. (2d) 102, decided on April 3, 1934, by the Circuit Court of Appeals for the 4th Circuit. This was an affirmance of the case reported in 3 Fed. Supp. 508, supra.

We doubt the desirability or usefulness of a tedious analysis of these several cases. There are certain general observations which we shall make, however, which apply to all of them.

First: All of these cases involve returns filed under the 1916 Revenue Act (39 Stat. 756), the 1917 Revenue Act (40 Stat. 300) or the 1918 Revenue Act (40 Stat. 1057). None of the cases involves a consideration of the 1921 Revenue Act (42 Stat. 227) as do the instant cases.

The language of the Court of Claims in *Globe Excelsior Oak Tanning Co. v. U. S.*, 2 Fed. Supp. 470, decided on February 6, 1933, distinguishes all cases of this type from the *Myles Salt Company, Isaac Goldmann Company* and *Valentine-Clark Company* cases, and the instant cases.

From the opinion at page 472:

> "The cases cited by plaintiff (Myles Salt Co. v. Commissioner (C. C. A.), 49 F. (2d) 232; Isaac Goldmann Company v. Burnet, 60 App. D. C. 265, 51 F. (2d) 427, and Valentine-Clark Company v. Commissioner (C. C. A.), 52 F. (2d) 346), all involve situations which arose under the Revenue Act of 1921 with respect to a reduction in the allowable specific exemption from that allowable under the prior act, *and are in no sense controlling under the Revenue Act of 1918, when the information required in a return under that act was often radically different (as in the case at bar) from that required under the prior act.*" (Italics supplied.)

Second: The Court of Claims does not mention the *Myles Salt Company* case or similar cases in the opinion in *Whitney Bodden Shipping Company v. U. S.*, 52 Fed. (2d) 1003, decided on October 20, 1931, nor are these cases mentioned in the Court of Claims'

opinion in *Ralston Purina Company v. U. S.*, 58 Fed. (2d) 1065, decided June 6, 1932. In our opinion the failure of the Court of Claims to mention the *Myles Salt* group of cases was not an oversight, but a deliberate ignoring of these cases for the reason they involve situations arising under the 1921 Revenue Act and were clearly inapplicable. This is evidenced by the language of the Court of Claims in the *Globe Excelsior Oak Tanning Company* case (quoted above) distinguishing earlier cases.

Third: The *Updike* cases, supra, are not even remotely referred to in *Myles Salt Company,* supra, decided by the Circuit Court of Appeals for the 5th Circuit on April 21, 1931. The same is true of the Court of Appeals of the District of Columbia in *Isaac Goldmann Company v. Burnet,* decided June 29, 1931, and also of *Valentine-Clark Company,* supra, decided by the Circuit Court of Appeals for the 8th Circuit on July 31, 1931. This latter is particularly significant, as the *Valentine-Clark Company* case was decided by the same Circuit Court (the 8th) which decided *Updike v. U. S.,* 8 Fed. (2d) 913, on December 1, 1925.

Here again the ignoring of the *Updike* cases by the 8th and 5th Circuit Courts of Appeals, and the Court of Appeals of the District of Columbia, could not have been an oversight, but was deliberately done, in our opinion, by reason of the nonapplicability of those cases to the question under consideration.

Fourth: The District Court opinion in *Clifton Manufacturing Company v. U. S.,* 3 Fed. Supp. 508,

decided January 31, 1933, distinguishes the *Myles Salt,* the *Isaac Goldmann* and *Valentine-Clark* decisions in the following language (3 Fed. Supp. 508 at 518):

> "Among the cases cited in plaintiff's brief are the following: Myles Salt Co. v. Commissioner, 49 F. (2d) 232, 233 (C. C. A. 5); Isaac Goldmann Co. v. Burnet, 60 App. D. C. 265, 51 F. (2d) 427; Valentine-Clark Co. v. Commissioner, 52 F. (2d) 346 (C. C. A. 8); Adams, Cushing & Foster, Inc., 19 B. T. A. 89 (dismissed by C. C. A., First Circuit, upon confession of error).
>
> "In the first case mentioned, a tax return was filed for the fiscal year ending in 1921, before the enactment of the 1921 Revenue Act. After the passage of the act, no new or amended return was filed or requested. No change was effected by the new act pertaining to the taxpayer's liability, except that by the new act it was deprived of a credit of some $2,000 on its net income, thus increasing its tax about $35. It was held that the return which would date the beginning of the limitation period and lack of which would prevent limitation is one made in substantial conformity to the law which required it. The court held that a return which starts the running of the statute 'must purport to cover the entire period involved, and must show the items of gross income, deductions, and credits of the taxpayer with such definiteness as to permit an assessment of the tax, if accepted as correct'. In that case the return was retained by the Commissioner, together with the money paid on it, and later on an audit of it was had, in 1923, without request for any amendment of it. *Under the cir-*

cumstances shown, we have no reason to question the correctness of the court's decision as limited to the exact point in issue.

"Likewise, in the case of Isaac Goldmann & Co. v. Burnet, supra, the issues involved an overlapping return for the twelve-month period ending April 30, 1921. In that case the court held 'We can find no provision in the Revenue Act of 1921 which requires the filing of a new return from taxpayers using the fiscal year basis, in cases where a return had been duly filed under existing law, except, perhaps, *in those cases in which, under the 1921 act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved.*' (Italics ours.) The court held further: 'In this instance, the taxpayer had filed the return it was required to file under the then prevailing law, and paid the tax. The new law was in all respects the same as the old so far as its tax liability was concerned. The repetition of the figures already filed would have been a wholly vain and useless proceeding.' This case followed the ruling laid down in the case of Myles Salt Co. v. Commissioner, supra. It is evident from the opinion that only one return was filed, and such expressions in the opinion as relate to the running of the statute from the date of the first return, if a second return had been filed, is mere obiter.

"The case of Valentine-Clark Co. v. Commissioner, supra, also arose under the provisions of the act of 1921, and related to an overlapping return for the fiscal year ending January 31, 1921. This case cites as authorities and follows

> the two cases above discussed. As in the other cases, it is necessary to consider the exact facts surrounding the case, in order to appreciate the distinction between it and the case at bar; and the final decision arrived at, in order to be properly appreciated, must be considered in connection with the reservations set out in the opinion." (Italics supplied).

In affirming the holding of the District Court in the *Clifton Manufacturing* case, the Circuit Court of Appeals for the 4th Circuit, says (70 Fed. (2d) 102):

> "We are in accord with the conclusion stated in the opinion of Judge Watkins in the District Court, 3 Fed. Supp. 508" etc.

The Circuit Court then refers to the opinions in the instant cases (69 Fed. (2d) 852) and the companion cases (69 Fed. (2d) 857).

The 4th Circuit Court, it seems, is inconsistent. It approves of the *conclusion* reached by the District Court in the *Clifton Manufacturing Company* case (3 Fed. Supp. 508) which *distinguished* the *Myles Salt* and similar cases, but it also approves of the decisions of the 9th Circuit in the instant cases, and companion cases, despite the fact it is conceded the instant cases are on all fours with the *Myles Salt* and similar cases.

We think that it can be fairly stated that broad distinctions are recognized by the Courts hereinafter listed between what we might call the Myles Salt

group of cases, involving situations arising under the 1921 Act and the *Updike* and similar cases, arising under earlier Acts. These Courts are:

Court of Claims: Distinguishes the two groups of cases in *Globe Excelsior Oak Tanning Co. v. U. S.*, 2 Fed. Supp. 470; decided February 6, 1933.

U. S. District Court, W. D., South Carolina distinguishes the two groups of cases in *Clifton Manufacturing Company v. U. S.*, 3 Fed. Supp. 508, decided January 31, 1933.

Court of Appeals of the District of Columbia: Impliedly recognized the distinction by failing to mention the Updike type of case in its opinion in *Isaac Goldmann Co. v. Burnet,* 51 Fed. (2d) 407, decided June 29, 1931.

Fifth Circuit Court of Appeals: Here also the Court fails to mention cases involving the 1916, 1917 and 1918 Revenue Acts in its opinion in *Myles Salt Company v. Commissioner,* 49 Fed. (2d) 232, decided on April 21, 1931.

Eighth Circuit Court of Appeals: No mention is made by this Court of the cases involving the earlier Revenue Acts in its opinion in *Valentine-Clark Company v. Commissioner,* 52 Fed. (2d) 346, decided September 31, 1931.

On the other hand, the following Courts do not seem to make any distinction between the two groups.

Fourth Circuit Court of Appeals: This Court, in *Clifton Manufacturing Company v. U. S.*, 70 Fed.

(2d) 102, decided April 3, 1934, involving a situation arising under the 1918 Act, refers with approval to the instant cases involving the 1921 Act. The Court is not entirely consistent, however, as it approves of the conclusion reached by the District Court (3 Fed. Supp. 508) in the same case, the District Court, however, having *distinguished* the two groups.

Ninth Circuit Court of Appeals: This Court, of course, relies on cases under earlier Revenue Acts, in deciding the instant cases and companion cases, which arose under the 1921 Act.

In our opinion, the decisions of the 5th and 8th Circuit Courts and Court of Appeals of the District of Columbia are the better reasoned and we believe the Ninth Circuit Court of Appeals should be reversed.

CONCLUSION.

We respectfully submit that the consolidated income and profits tax return filed by Zellerbach Paper Company on behalf of itself and its subsidiaries on July 16, 1921, for the fiscal year ended April 30, 1921, while the 1918 Revenue Act was in force became the return required under the Revenue Act of 1921 on its adoption on November 23, 1921, and which was retroactive to January 1, 1921.

We submit that this return was retained by the Commissioner and adopted by him as the return required by the Revenue Act of 1921; that it was used

by him as the basis of his audit for the fiscal year in question; that it served as the basis of his deficiency notices issued to the several taxpayers on May 11, 1928, and that the filing of said returns was a compliance with the provisions of the 1921 Revenue Act.

We submit that the small additional tax resulting from the elimination of one-third of the $2000 exemption under the provisions of the 1921 Act could have been and actually was, computed and determined by the Commissioner, and that the necessity of making this slight computation did not justify the Commissioner in withholding the issuance of his deficiency notice for a period exceeding six years after the return was filed.

We submit that the four year period of limitations provided in the 1921 Act was set in motion July 16, 1921, the date of the filing of the consolidated return; that the waiver obtained by the Commissioner on February 27, 1925, within which an additional assessment might be made (or deficiency notices mailed) expired December 31, 1925, and no additional waivers having been obtained the Commissioner was thereupon barred.

We submit that taxing acts, including periods of limitation embodied therein, must be construed liberally in favor of the taxpayer. *U. S. v. Updike,* 281 U. S. 489, 496, 74 L. ed. 984, 991; *Bowers v. N. Y. and A. Lighterage Co.,* 273 U. S. 346, 349, 71 L. ed. 676, 678.

And finally, we submit that the Circuit Court of Appeals for the 9th Circuit, has reached incorrect con-

Appendix A

PERTINENT PARTS OF THE REVENUE ACT OF 1918, 40 STAT. 1057.

As to the filing of returns:

"Section 227 (a). That returns shall be made on or before the 15th day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March."

As to the $2000 credit or exemption:

"Section 236. That for the purpose only of the tax imposed by Section 230 there shall be allowed the following credits * * *

* * * * * * *

(c) In the case of a domestic corporation, $2000."

As to corporation returns generally:

"Section 239. That every corporation subject to taxation under this Title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title."

As to consolidated returns:

"Section 240 (a). *That corporations which are affiliated within the meaning of this section shall,* under regulations to be prescribed by the Commissioner with the approval of the Secretary, *make a consolidated return* of net income and invested capital for the purposes of this title and Title III, *and the taxes thereunder shall be com-*

puted and determined upon the basis of such returns * * *

In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit of $2000 (as provided in section 236); * * *

(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

As to the time of filing corporate returns:

"Section 241 (a). That returns of corporations shall be made at the same time as is provided in Subdivision (a) of Section 227."

As to the necessity of the Commissioner examining the return:

"Section 250 (b). As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed * * *

If the amount already paid is less than that which should have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. In such case, if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no penalty because of such understatement. If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due.

If the understatement is false or fraudulent with intent to evade the tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns wilfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the amount of the deficiency."

As to the Statute of Limitations:

"Section 250 (d). Except in the case of false or fraudulent returns with intent to evade the tax, *the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made,* and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be deter-

clusions in the several cases involved herein, and should be reversed.

Dated, San Francisco, California,
September 19, 1934.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioners.

(Appendices Follow.)

mined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

As to the right of the Commissioner to demand a return:

"Section 1305. * * *

Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax."

PERTINENT PARTS OF THE REVENUE ACT OF 1921, 42 STAT. 227.

As to the "first taxable year" under the Act of 1921:

"Section 200. That when used in this title

(1) The term 'taxable year' means the calendar year, *or the fiscal year ending during such calendar year,* upon the basis of which the net income is computed under section 212 or section 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. *The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921;*"

"Section 205. (a). That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in [illegible]21, his tax under this title for the taxable y[illegible]921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of

1918 at the rates for the calendar year 1920, which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this Title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period."

As to the time of filing returns:

"Section 227 (a). That returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March."

As to the 1921 Act superseding the 1918 Act:

"Section 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount."

As to the credit or exemption allowed domestic corporations:

"Section 236. That for the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

* * * * * * *

(b) In the case of a domestic corporation the net income of which is $25,000 or less, a specific credit of $2000; but if the net income is more than $25,000 the tax imposed by section 230 shall not exceed the tax which would be payable if the $2000 credit were allowed, plus the amount of the net income in excess of $25,000;"

As to corporate returns generally:

"Section 239 (a). That every corporation subject to taxation under this title and every personal service corporation shall mak a return, stating specifically the items of its gross income and the deductions and credits allowed by this title."

As to consolidated returns:

"Section 240 (a). That corporations which are affiliated within the meaning of this section may, for any taxable year beginning on or after January 1, 1922, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return * * *

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportion as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. *There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.*

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

* * * * * * *

"(e) Corporations which are affiliated within the meaning of this section shall make consolidated returns for any taxable year beginning prior to January 1, 1922, in the same manner and subject to the same conditions as provided by the Revenue Act of 1918."

As to the time of filing corporate returns:

"Section 241 (a). That returns of corporations shall be made at the same time as is provided in subdivision (a) of section 277, * * *"

As to the necessity of the Commissioner examining the return:

"Section 250 (b). As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed * * *

If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called 'deficiency'), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due (or, if paid on the installment basis, on the deficiency of each install-

ment from the time the installment was due), *shall be paid upon notice and demand by the collector.* If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of 1 per centum per month on the amount of such deficiency in the tax from the time it was due (or, if paid on the installment basis, on the amount of the deficiency in each installment from the time the installment was due), which penalty and interest shall become due and payable upon notice and demand by the collector. If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns wilfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector."

As to the Statute of Limitations:

"Section 250 (d). The amount of income, excess profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or

under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled, 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed * * *"

As to the effective date of the "Income Tax" provisions:

"Section 263. That this title shall take effect as of January 1, 1921."

As to the right of the Commissioner to demand a return:

"Section 1307. That whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax."

As to the repeal of the 1918 Act by the 1921 Act:

'Section 1400 (a). That the following parts of the Revenue Act of 1918 are repealed, to take effect (except as otherwise provided in this Act) on January 1, 1922, subject to the limitations provided in subdivision (b):

Title II (called 'Income Tax') as of January 1, 1921;"

Section 3176 of the Revised Statutes as amended by Section 1103 of the Act of February 26, 1926, is in part as follows:

> "If any * * * corporation * * * fails to make and file a return * * * at the time prescribed by law or by regulation * * *, the collector or deputy collector *shall* make the return * * * from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector."
>
> * * * * * * *
>
> "In case of any failure to make and file a return * * * the Commissioner of Internal Revenue * * * *shall* add to the tax 25 per centum of its amount * * *"
>
> "The amount so added to any tax shall be collected at the same time and in the same manner and as part of the tax * * *"

TREASURY DECISIONS.

Treasury Decision 3305, issued by the Commissioner of Internal Revenue under date of March 16, 1922, reads as follows:

> "If any taxpayer has before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under

the Revenue Act of 1918, *and is subject to additional tax for the same period* under the Revenue Act of 1921, the return *covering such additional tax* shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the law and regulations, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. If no part of the tax for the taxpayer's fiscal year was due until after November 22, 1921, the whole amount of tax due, including the tax due under the original return *and the additional tax due under the new return,* will be payable in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. Attention is directed to the provisions of sections 214 (a) 9 and 234 (a) 8 of the Revenue Act of 1921.

D. H. Blair,
Commissioner of Internal Revenue."

T. D. 3310, issued by the Commissioner under date of March 28, 1922, reads as follows:

"T. D. 3305, approved March 16, 1922, is amended to read as follows:

If any taxpayer has, before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under the Revenue Act of 1918, *and is subject to additional tax for the same period* under the Revenue Act of 1921, *a return covering such additional tax* shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the laws and

regulations, and payment of such additional tax will be due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. Attention is directed to the provisions of sections 214 (a) 9 and 234 (a) 8 of the Revenue Act of 1921.

D. H. Blair,
Commissioner of Internal Revenue."

(Italics supplied throughout.)

Appendix B

THE FOLLOWING IS THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN MYLES SALT CO. v. COMMISSIONER, 49 FED. (2d) 232, RENDERED ON APRIL 21, 1931:

"The sole question is limitation. On May 16, 1921 (May 15th was Sunday), Myles Salt Company filed its income tax return for its fiscal year ending February 28th, 1921, and paid the tax shown by it, all according to the Revenue Act of 1918 then in force (40 Stats. 1057). On November 23rd, 1921, the Revenue Act of 1921 was approved, effective as to its income tax provisions as of January 1st, 1921 (Section 263), and repealing as of January 1st, 1921, the corresponding provisions of the Revenue Act of 1918 (Section 1400). No change was made affecting the tax of this taxpayer except that, because its net income exceeded $25,000.00, it was deprived since January 1st of the credit of $2000.00 allowed by Section 236 (42 Stat. 257), thus increasing its tax about $35.00. *No new or amended return showing this changed computation was filed or requested.* On September 17, 1926, the Commissioner sent out a deficiency notice preparatory to assessing an additional tax arising mainly from corrections in the deductions claimed for depletion and inventory losses. Before the Board of Tax Appeals the taxpayer claimed that the assessment was barred by the provisions then in force of the Revenue Act of 1926, Section 277 (a) (2), 26 U. S. C. A. 1057 (a) (2), 'The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 * * * shall be assessed

within four years after the return was filed'. By Section 200 (1) of the Act of 1921 (42 Stat. 227) the taxable year 1921 included fiscal years ending during 1921. The Board held, three members dissenting, that no lawful return had been filed for the fiscal year in question, and no bar had attached because of Section 278 (a) of the Act of 1926 (26 U. S. C. A. 1058). 'In case of a false or fraudulent return with intent to evade the tax or a failure to file a return the tax may be assessed * * * at any time'.

The return which will date the beginning of the limitation period, and lack of which will prevent limitation, is one made in substantial conformity to the law which required it. The Act of 1918 and that of 1921 in Section 239 (40 Stat. 1081, 42 Stat. 259 both require 'Every corporation * * * shall make a return stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice-president, or other principal officer and by the treasurer or assistant treasurer.' It is no return as respects limitation if made tentatively and not intended to be the basis of an assessment, *Florsheim Brothers v. United States,* 280 U. S. 453, 50 S. Ct. 215, 74 L. Ed. 542; or if not sworn to at all, *Lucas v. Pilliod,* 281 U. S. 245, 50 S. Ct. 297, 74 L. Ed. 829, 67 A. L. R. 1315. It must purport to cover the entire period involved, and must show the items of gross income, deductions and credits of the taxpayer with such definiteness as to permit an assessment of the tax, if accepted as correct. *United States v. National Tank & Export Co.* (C. C. A.), 45 Fed. (2d) 1005. *Perfect accuracy*

and completeness is not necessary, for there could rarely be an additional tax assessed except on some correction of the return, and, if the need of correction is held to make it no return, such deficiency assessments would never be barred. If, on the other hand, the return is so false as to show fraud and intent to evade the tax, there is by the special provision above quoted no limitation. The Board found no fraud or bad intent in this return. *If it had been filed or refiled the day after the Act of 1921 was passed, it would have been clearly good; the error in the deductible credit being easily remediable by the Commissioner without further information from the taxpayer.* But it is said that, because it was filed before the Act was passed it cannot be a return under the Act. The Act itself, however, is retroactive, declaring itself to be effective as of January 1, 1921. If in effect on that date for other purposes, why should it not speak from that date as to filing returns? Difficulty can arise only concerning returns for fiscal years ending during 1921. Congress had them in mind, for in Section 205 (a) it was provided: 'If a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be' arrived at on a basis stated. Entirely conscious, therefore, that such returns had already been filed before the Act was passed on November 23rd, the only provision Congress made as to filing them was Section 227 (a): 'Returns * * * shall be made on or before the 15th day of the third month following the close of the fiscal year.' If this requirement is read as of January 1st the return in question was filed in literal compliance with it.

That it was the intent of Congress thus to ratify and adopt returns filed between January 1st and the passing of the Act also appears from its repeal of the former Act as of January 1st, so that there was no law except the Act of 1921 that could apply to such returns. This intent is further shown by the history of the legislation, for this same situation arose when the Act of 1918, approved February 24th, 1919 (40 Stat. 1057), retroactively displaced the Act of 1917. Its Section 227 (a) was identical with that just quoted, and was interpreted by Treasury Decision 2797, whereby fiscal year returns filed before the Act was passed were treated as sufficient, and were referred to as the 'original return', but if an additional tax was due under the new Act 'a return covering such additional tax' only was required, and called an 'amended return.' Thus in no case was the original return treated as a nullity, but as valid so far as it went. By a settled principle Congress is to be considered as having adopted this official construction when it reenacted the same words in the new law. *United States v. G. Falk & Bro.*, 204 U. S. 143, 27 S. Ct. 191, 51 L. Ed. 411; *Stairs et al. v. Peaslee*, 18 Howard 521, 15 L. Ed. 474. Many decisions of the Board of Tax Appeals have held that returns filed before the law was passed are not nullities, but sufficient to date the beginning of limitation if no additional tax was imposed on the particular taxpayer by the law, although the return was actually incorrect and the tax paid insufficient. *Ley & Co., Inc.*, 9 B. T. A. 749; *Palmetto Coal Co.*, 11 B. T. A. 154; *Denholm & McKay Co.*, 15 B. T. A. 225. *This return was retained by the Commissioner, together with the money paid on*

it. An audit of it was had in 1923 without request for any amendment of it. The deficiency letter of September 17th, 1926, states that 'An audit of your income and profits tax return for the fiscal year ended February 28, 1921, has resulted', etc., and the statement attached is based upon the figures of the return; so that the additional tax is proposed to be assessed on the return. These things are mentioned not as raising an estoppel to deny that it is a return, but as further tending to show that it was treated in administrative practice as, and understood to be, a duly filed return and practically sufficient as such until the question of limitation was raised. We hold that limitation is to be dated from its filing on May 16th, 1921. We do not inquire whether the tax for the period prior to January 1st, 1921, which is by Act of 1921, Section 205 (a), to be measured by the provisions of the Act of 1918, is imposed by the one Act or the other, since the limitation period applicable to either had expired when the assessment was attempted. The entire assessment is barred. The petition for review is granted, and the case is remanded for further proceedings not inconsistent herewith."

THE FOLLOWING IS THE DECISION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN ISAAC GOLDMANN CO. v. DAVID BURNET, 51 FED. (2d) 427, RENDERED ON JUNE 29, 1931:

"Groner, Associate Justice:

Appellant kept its books and made its tax returns on the fiscal year basis. Its taxable year 1920-1921 was the twelve months' period ending

April 30, 1921. On July following, it filed its return under the provisions of the Revenue Act of 1918 (40 Stat. 1057), showing net income of $82,964.70 and a resulting tax liability of $15,830.26. Gross income was properly shown, the schedules required by Treasury regulations were attached, and the honesty and good faith of the return is not questioned. More than four years later the Commissioner made a deficiency assessment.

On November 23, 1921, the Revenue Act of 1921 was passed, and its provisions made retroactive as of January 1. (Sec. 263, 42 Stat. 227, 271.) The only effect of the 1921 act, so far as it concerned appellant's tax liability for the period January 1 to the end of appellant's fiscal year—April 30, 1921—was to limit proportionately appellant's right to a specific exemption, allowed under the 1918 act but not allowed under the 1921 act, to the period prior to January 1. The result of this was to make appellant liable, under the new act, for a small additional tax. The Commissioner claims that this fact made necessary the filing by appellant of a new return, and that its subsequent filing of an amended return, pursuant to Treasury Decision 3220, should either be treated as the only return for the fiscal year period in controversy, or else appellant should be regarded as never having filed any return, and that, in either case, the deficiency assessment would be within the limitation period.

Treasury Decision 3220, issued the latter part of 1921, was designed to correct a practice apparently then more or less general on the part of taxpayers in using 'appreciated' values in determining invested capital, and required, from such

as had, an amended return within ninety days. The bulletin confined the requirements of the return to such additional information only as should be necessary to show the correct values to redetermine the amount of tax to be assessed. In obedience to this bulletin, and for the purpose only of correcting the item of invested capital as shown in the former returns, appellant, still claiming the 1918 exemption, filed on January 14, 1922, an amended return, and the question which we have to answer is whether the four-year period of limitations began to run with the filing of the original return in July, 1921, because if it did not, the additional assessment is valid. The Board held, following *Hutchinson Co. v. Commissioner,* 14 B. T. A. 367, 8, that because the 1921 Act abolished the $2000 exemption, appellant owed additional taxes under the provisions of that act, and, inferentially at least, since it owed additional taxes, it owed likewise the duty of filing a return with specific reference to the 1921 Act, and that, until it did so, the limitation did not begin to run.

In this conclusion, we find ourselves unable to agree. We can find no provision in the Revenue Act of 1921 which requires the filing of a new return from taxpayers using the fiscal year basis, in cases where a return had been duly filed under existing law, except, perhaps, in those cases in which, under the 1921 Act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved. *The Commissioner himself realized the confusion and waste inevitable if the returns already made were wholly disregarded and new*

ones required, and, in Treasury Decision 3310, demanded new returns from taxpayers who had, under the 1918 Act, made returns for the fiscal year ending during 1921 only in those cases in which the taxpayer was subject to specific additional taxes under the 1921 Act. The purpose of this ruling, obviously, we think, was to provide a new return only in those cases where, under the provisions of the latter act, a liability for other or additional taxes was created through a change in the basis of computation, necessitating other information or new figures to allow the Commissioner to determine the tax liability under the Act.

In this instance, the taxpayer had filed the return it was required to file under the then prevailing law, and paid the tax. The new law was in all respects the same as the old so far as its tax liability was concerned. The repetition of the figures already filed would have been a wholly vain and useless proceeding. *The elimination of the part of the exemption not allowable after January 1 was a simple computation appearing from the returns filed, and the adjustment of this item to conform to the new law needed neither explanation nor new returns.* The new act provided the occasion, and the return furnished the basis, and the act itself imposed on the Commissioner (250 (b)) Revenue Act 1921, the duty of examination to the end that the correct tax should be ascertained. The retroactive provisions of the 1921 Act present no novelty, for the 1918 Act itself replaced retroactively the 1917 Act. Under the provisions of the 1918 Act, the tax was increased over that exacted under either the 1916 or 1917 Act, but,

under its provisions as to filing returns on the fiscal year basis, the Commissioner ruled (Treasury Decision 2797) that the new return required was satisfied by inclusion only of the items embracing the additional tax, and spoke of the former returns, i. e., those filed before the Act was approved, as original returns, and the additional returns required as supplemental or amended returns, and while we do not invoke this use of words as foreclosing the question or as controlling, we nevertheless think it clearly reflects the real situation, and that, in this aspect, the returns filed by appellant were, especially in view of the admission that they were in all respects honestly believed to represent the true state of appellant's liability, valid returns and not a nullity. *The case turns, we think, upon this: If the original returns filed by appellant were, as the Board apparently thought, a nullity, then, obviously, the deficiency assessment was in time, but if, on the contrary, they were valid returns susceptible of amendment by the Commissioner in the ascertainment of the correct tax, or requiring only a corrected return in eliminating that portion of the exemption which was abolished by the later act, then, equally, obviously, the deficiency assessment was made too late.* It was conceded, in the opinion of the Supreme Court in *Florsheim Brothers v. United States,* 280 U. S. 453, 462, 50 S. Ct. 215, 218, 74 L. Ed. 542, that the filing of a return, though defective or incomplete, is 'sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period.' It was likewise held in *Willingham Loan Co. v. Commissioner* (C. C. A. 5), 36 F. (2d) 49, that the statute begins to run

whenever the taxpayer has filed returns with the Commissioner *which show facts upon which the proper assessment for the taxable period may be made.* See also *Thomas v. United States* (D. C.), 22 F. (2d) 1000. The Board of Tax Appeals has also held that this is the rule. See *Appeal of National Refining Co. et al.,* 1 B. T. A. 236; *Appeal of New York Trust Co.,* 3 B. T. A. 583; *Lancaster Lens Co. v. Commissioner of Internal Revenue,* 10 B. T. A. 1153.

To say that the original return filed by appellant in this case is no return, though filed in strict conformity to the law then prevailing is, we think, wholly incorrect. To call the return which it later filed to conform to a ruling of the Department—a thing in itself wholly unresponsive to anything in the 1921 Act—a new return, wholly unrelated to the other, is, we think, equally incorrect. Appellant, under the method which it had adopted with the consent of the Department, was required to file its returns within three months after the expiration of its fiscal year, and to pay its tax. If it had failed to do either, it would have made a default subjecting it to penalty. If it had filed a dishonest report, it would have been subject to still further penalty. As it happened, it did precisely what the law, as it then was, required it to do, and now to say that, because of the retroactive provisions of the new act, what it did was a nullity, is, it seems to us, without justification or support. If more was required, it was supplementary and not original, and hence, as the Supreme Court said, did not toll the statute. We do not mean to say that the Commissioner might not have required the filing of additional returns to make those already filed conform to the new law, but

such new returns, if filed for that purpose, would, as we think, have relation to the original return, and the latter, rather than the former, would be the starting point for the limitation.

The precise question here involved was likewise involved in *Myles Salt Co. v. Commissioner* (decided by the Fifth Circuit C. C. A., April 21, 1931), 49 Fed. (2d) 232, and it was decided there, as we think correctly, that the original return established the period from which the limitations began to run.

Reversed."

THE FOLLOWING IS THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IN VALENTINE-CLARK CO. v. COMMISSIONER, 52 FED. (2d) 346, RENDERED ON JULY 31, 1931:

"Booth, Circuit Judge, delivered the opinion of the Court.

This is a petition for review of an order of the Board of Tax Appeals which redetermined a deficiency in the income and profits taxes of petitioner for the fiscal year ending January 31, 1921. The determination of the Commissioner of Internal Revenue was upheld.

The facts are not in dispute. The petitioner, taxpayer, kept its books during the taxable period involved on the basis of a fiscal year ending January 31, 1921. April 14, 1921, the taxpayer filed its return for the fiscal year showing a net income of $37,527.43. In due course, it paid taxes on that basis. After the enactment of the Revenue Act of 1921 (November 23, 1921 (42 Stat. 227)), the taxpayer filed no other or further return for the fiscal

year ending January 31, 1921. No waiver of the statutory limitation period on assessment or collection of the 1921 income or profits taxes was executed or filed with the Commissioner of Internal Revenue by the taxpayer. No notice was served upon the taxpayer requiring a further return or statement as provided by Section 1305 of the Revenue Act of 1918 (40 Stat. 1142), and by Section 1307 of the Revenue Act of 1921 (42 Stat. 310). June 3, 1926, the Commissioner mailed to the taxpayer the so-called sixty-day deficiency letter, provided for in Section 274 (a) of the 1926 Revenue Act (26 U. S. C. A. 1048), showing a net income for the fiscal year ending January 31, 1921, of $46,734.04, and a deficiency in tax due from the taxpayer for said fiscal year of $5777.35. No part of said sum of $5777.35 has been assessed against the taxpayer either before or since the mailing of said deficiency letter, and no part of said sum has been paid by the taxpayer.

There is no provision in the Revenue Act of 1921 requiring a corporation, which, prior to the passage of that Act, had filed its return for a fiscal year ending in 1921, to file any additional return for such year.

In the return filed by the taxpayer on April 14, 1921, an exemption of $2000 was used and this was allowable under the 1918 Revenue Act (Sec. 236, 40 Stat. 1080); but this exemption was not allowable under the 1921 Revenue Act inasmuch as the taxable income of the petitioner exceeded $25,000.00 (1921 Revenue Act, Sec. 236, 42 Stat. 257).

By Sections 263 and 338 of the Revenue Act of 1921 (42 Stat. 271, 277), the provisions of the Act included in Titles II and III, Sections 200-338

(relating to income taxes and profits taxes), were made retroactive, taking effect as of January 1, 1921.

Accordingly, the taxpayer was not entitled to the full exemption claimed of $2000, but only to eleven-twelfths thereof, or $1833.33, since the 1918 Act applied to the first eleven months of the fiscal year ending January 31, 1921.

Apart from this slight discrepancy, the return of the taxpayer filed April 14, 1921, was in accord with the provisions of the 1921 Revenue Act, and the discrepancy was apparent on the face of the return.

In making up the schedules attached to the deficiency letter dated June 3, 1926, the Commissioner made use of the return of the taxpayer, which was filed April 14, 1921, and among other matters made correction of the discrepancy above mentioned.

Relevant statutory provisions are set out in the margin. (These statutory provisions are omitted in this brief.)

The question presented by the present petition for review is whether the applicable period of limitation had run prior to the sending out by the Commissioner of the sixty-day deficiency letter of June 3, 1926.

The Commissioner takes the position that the Statute of Limitations contained in the 1921 Revenue Act is the one applicable; the taxpayer contends that the Statute of Limitations contained in the 1924 Revenue Act is the one applicable.

Inasmuch as the period of limitation is the same (four years from the filing of the return)

under either statute, we pretermit discussion of the question, which statute governed.

The Board of Tax Appeals stated its view of the case as follows:

'*It is stipulated that in the return filed the taxpayer took an exemption in the amount of $2000 in the computation of tax due under the Act of 1918, and that under the Act of 1921, it was not entitled to any such exemption for the fiscal year ended January 31, 1921.* It is obvious, therefore, that an additional tax for the fiscal year ended January 31, 1921, was imposed on this taxpayer by the Revenue Act of 1921. In such circumstances the Commissioner by his regulations, supra, required an additional return. Such return has never been filed, and, therefore, there is no return of this taxpayer for the year ended January 31, 1921, which can be regarded as the return required by law and no date from which the statute of limitations started to run against this petitioner for such taxable year.'

Counsel for the Commissioner on this petition for review take a somewhat different view. In their brief their position is thus stated:

'In this case the statute could be satisfied only by the filing of a return *under* the Revenue Act of 1921. This necessarily means a return filed in response to the requirements of the 1921 Act, and this requirement could not have been satisfied before the statute was enacted',

and again:

'The return under the Act of 1921 could be made only after the enactment of that law. It follows that only upon the filing of a return for the taxable year 1921 some time after the passage of the 1921 Act could the statutory bar begin to

operate. Since petitioner has filed no such return, the Commissioner was and is free to assert a deficiency.'

We cannot agree with either of the positions thus stated. We do not think that it was the intention of Congress that all returns for fiscal years ending in 1921 which were filed prior to the passage of the Revenue Act of 1921 should be considered nullities.

Viewing the facts in the light of the various statutory provisions quoted, we think it is clear that the taxpayer filed its return within the proper time; that the return contained the required information as to the various items; that the error in respect to the exemption appeared on the face of the return, and required no additional information for its correction.

The return would unquestionably have been valid and would have set the Statutes of Limitations in motion if it had been filed the day after the approval of the Revenue Act of 1921; but that Act, by its terms, became effective January 1, 1921. It speaks as of that date, and we have no difficulty in holding that returns filed after January 1, 1921, which contained the information required by the Act were returns *under* the Act. That such was the intent of Congress, we think is shown by the provisions of Sec. 205 (a) of the Act (42 Stat. 232) which reads:

'That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: * * * (followed by a stated basis);'

and the same section further provides:

'Any amount paid before or after the passage of this Act on account of the tax imposed for such

fiscal year by Title II of the Revenue Act of 1918 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of Section 252.'

These provisions, when read in connection with Sec. 1400 of the Revenue Act of 1921, (42 Stat. 320), which repealed the Revenue Act of 1918 as of January 1, 1921, and in connection with Section 227 (a) and 241 (a), (42 Stat. 251, 260), which fixed the time for filing returns, *show conclusively, in our judgment, that Congress intended to ratify and adopt the returns filed between January 1, 1921, and the passing of the Act of 1921.* Such a situation was not new. The Revenue Act of 1918, approved February 24, 1919, was also retroactive in its operation. It contained sections practically identical with Sections 227 (a), 241 (a), and 205 (a) of the Revenue Act of 1921. The returns filed before the 1918 Act was passed for fiscal years ending in 1918 were not treated as nullities but as 'original returns'; and if an additional tax was imposed by the Revenue Act of 1918, an additional return or an amended return only was required. See T. D. No. 2797.

Still further, the Commissioner himself, in preparing the sixty-day deficiency letter of June 3, 1926, did not treat the return of the taxpayer, filed April 14, 1921, as a nullity. On the contrary, he made full use of it as a basis for his deficiency letter. We mention this fact not as a ground for waiver or estoppel, but solely as showing that the Government officials whose duty it was to pass upon returns did not hold this par-

ticular return to be a nullity. *The position that the return was a nullity is evidently an afterthought, arising when the question of the Statute of Limitations was raised.*

As to the effect of T. D. Nos. 3305 and 3310, set out in the margin, it may well be doubted whether the 'additional tax' therein mentioned covers or was intended to cover a partial loss of exemption, such as occurred in the case at bar, wherein no new tax was to be levied and no new basis of taxation to be applied. But even if this view is not correct, yet said Treasury Decisions do not purport to make returns already filed nullities, but recognize them and simply call for a further return as to the additional tax.

In the case at bar, no such further return was necessary. The information contained in the return as filed was sufficient and was demonstrated so to be by the Commissioner himself. The filing of a second return after the passage of the Revenue Act of 1921 would have been a useless repetition.

We hold that the return filed April 14, 1921, was made by the taxpayer in good faith and in substantial conformity to both the Revenue Act of 1918 and the Revenue Act of 1921. Such return was not tentative, and was intended as the basis of an assessment. It showed the items of gross income, deductions and credits of the taxpayers. It covered the entire period involved. It was properly signed and verified. *The fact that it contained an inaccuracy did not cause it to become a nullity. United States v. Mabel Elev. Co.,* (D. C.) 17 F. (2d) 109. The Board of Tax Appeals has so held in numerous cases. Mabel Elev.

Co., 2 B. T. A. 517; Indiana Rolling Mills Co., 13 B. T. A. 1141; Darling-McDuff Coal Co., 15 B. T. A. 110; Denholm & McKay Co., 15 B. T. A. 225. And the mere fact that the return was filed before the Revenue Act of 1921 was passed did not cause it to become a nullity. Such has been the ruling of the Board of Tax Appeals in numerous cases. Fred T. Ley & Co., Inc., 9 B. T. A. 749; M. Brown & Co., 9 B. T. A. 753; Keystone Coal & Mining Co., 10 B. T. A. 295; Palmetto Coal Co., 11 B. T. A. 154; Denholm & McKay Co., supra.

It follows from the foregoing that the return was valid and was the return required by existing law; and that the Statute of Limitations began to run from April 14, 1921, the date when the return was filed.

The question involved in this case has been passed upon, and the same conclusion reached, by the Circuit Court of Appeals for the Fifth Circuit in the case of *Myles Salt Co. v. Commissioner,* 49 F. (2d) 232; also by the Court of Appeals of the District of Columbia in the case of *Isaac Goldmann Co. v. Commissioner,* 51 Fed. (2d) 427.

We are in full accord with the well-reasoned opinions in both of these cases, and with the conclusions reached.

The petition for review in the case at bar is granted, and the cause is remanded to the Board of Tax Appeals for further proceedings not inconsistent with the views herein expressed". (Italics supplied).